[HIGH COURT OF AUSTRALIA.]

TENENWURCEL . . . . . APPELLANT;
DEFENDANT,

AND

TENENWURCEL . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1958.

MELBOURNE, *Mar.* 4;

SYDNEY, *April* 2.

Dixon C.J., Williams, Webb, Fullagar and Taylor JJ.

Practice—High Court—Appeal from Supreme Court of State—Appealable amount—"Claim to or respecting any property . . . of the value of £1,500 *"—Claim by defendant that property in question held in trust for him—Property purchased for total price of* £2,100 *payable by deposit and balance over period of years—Subsequent transfer of title and taking of mortgage by vendor—Only* £1,340 *paid off at time of trial—Declaration at trial that defendant entitled to charge on property for* £409*—Otherwise judgment for plaintiff for possession of property—Purported appeal by defendant—Whether judgment involving claim to property of value of* £1,500*—Onus of establishing competency of appeal—Judiciary Act* 1903-1955 (*No.* 6 *of* 1903—*No.* 35 *of* 1955), *s.* 35 (1) (*a*).

The appellant claimed that he was beneficially entitled to certain premises standing in the name of the respondent. The premises were subject to a mortgage representing a balance of purchase money. After deducting the amount of the mortgage from the value of the premises the amount remaining was less than £1,500. The appellant's case was that he had bought the land for himself in the respondent's name being himself liable for the purchase money. In the Supreme Court the facts were found against the appellant and his claim was dismissed.

Held that the judgment did not prejudice him to the extent of £1,500 and he was not entitled to appeal as of right.

OBJECTION to competency of appeal from the Supreme Court of Victoria.

Luba Tenenwurcel, the respondent to a purported appeal from the Supreme Court of Victoria wherein Ignacy Tenenwurcel was

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appellant objected to the competency of the appeal. The relevant facts appear in the judgment hereunder.

Appellant in person.

M. Ravech for the respondent.

Cur. adv. vult.

April 4.

THE COURT delivered the following written judgment :—

This appeal was met by an objection to its competency on the ground that the judgment from which it is sought to appeal does not fulfil any of the requirements of s. 35 (1) (*a*) of the *Judiciary Act* 1903-1955. The question is whether the judgment involves a claim demand or question to or respecting property amounting to or of the value of £1,500. The appeal is from a judgment of the Full Court of the Supreme Court of Victoria dismissing an appeal from a judgment of *Pape* J. The judgment of *Pape* J. was given upon the trial of an action in which the present appellant was the defendant and the respondent who now objects to the competency of the appeal was the plaintiff. The plaintiff's claim in the action was for the recovery from the defendant of certain premises in North Carlton. The defendant, in answer to the claim, said that he was beneficially entitled to the premises, the plaintiff being a trustee for him : further that he was a tenant entitled to rely on the *Landlord and Tenant* (*Amendment*) *Acts* (Vict.). It appeared from documents put in evidence at the trial that the plaintiff and defendant had been married at the Great Synagogue in Warsaw in 1935. The marriage had not been registered as a civil marriage in Poland and on 25th January 1955 at a beth din in Melbourne the plaintiff received her get or bill of divorcement. On 29th April 1952 she entered into a contract for the purchase of the fee simple in the premises now in question. The amount of the purchase money was £2,100 of which £500 was payable as a deposit and the balance in quarterly instalments over ten years. However on 6th June 1952 she became the registered proprietor of the land subject to the mortgage to the vendor. That mortgage was replaced with another mortgage registered on 23rd September 1957 given to a different mortgagee. But that is not material to the question now before us of the competency of the appeal. At the time of the trial of the action it appears that not more than £840 had been paid off the balance of purchase money secured by the mortgage which with the £500 deposit made £1,340. The defendant's case was that the land was bought by him in the plaintiff's name, he providing

the money. He counterclaimed for relief based on this case. At the trial *Pape* J. found against his claim on the facts. But of course for present purposes we proceed on the hypothesis that the appeal against that finding might be supported. For we are to look at the prejudice to the defendant in money value which the judgment for the recovery of the premises may produce. His claim is that he is entitled to the property but subject to the mortgage representing unpaid purchase money. But there is a further qualification to be made. In the course of the evidence at the trial it appeared to the satisfaction of *Pape* J. that a sum of £409 had in fact been paid out of the defendant's money towards the purchase money. The learned judge took the course of declaring that the defendant was entitled to a charge on the property for that amount. No objection was raised on the part of the plaintiff to his Honour's doing so and the result was that the land for the recovery of which the judgment was pronounced stood subject to a charge in the defendant's favour. If the assumption is adopted that the premises were of the value for which they were bought in 1952 the consequence must be that the judgment against which the defendant has appealed cannot prejudice him to the extent of £1,500. His claim in effect is to an equity of redemption on the land, not to an unencumbered fee simple, and the figures show that the value, on the hypothesis stated, of the interest he claims could not be more at the time of the judgment than £1,340 and, having regard to the charge, was more probably £931. His counterclaim was dismissed but the dismissal of his counterclaim merely represented the counterpart of the judgment on the plaintiff's claim. The hypothesis that the land is worth no more than the purchase price is one which the defendant has made no attempt to displace. By O. 70, r. 8 it is provided that upon the hearing of an objection the burden of establishing the competency of the appeal is upon the appellant. In the present case it seems there is no suggestion that the value of the premises could have so risen between 1952 and 1957 as to convert a margin of £931 into one of £1,500. But there is no evidence of value except the contract of sale. The result is that it has not been shown that, in the language of s. 35 (1) (*a*) (1) and (2) of the *Judiciary Act*, the judgment of the Full Court of the Supreme Court was given or pronounced for or in respect of any matter at issue amounting to or of the value of £1,500 or involves directly or indirectly any claim demand or question to or respecting any property or any civil right amounting to or of the value of £1,500.

Accordingly the appeal is incompetent.

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The defendant gave notice that he would seek special leave if it was held that he had no appeal as of right. But there is no ground whatever for granting special leave from the judgment of the Full Court of the Supreme Court.

The appeal should therefore be dismissed as incompetent.

Appeal dismissed as incompetent with costs.

Solicitor for the respondent, *J. Okno.*

R. D. B.